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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 547

COMMONWEALTH TRUST COMPANY OF PITTSBURGH and J. KNOWLES WOODWELL, Executors of the Estate of John W. Herron, Deceased,
Petitioners,

v.

WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

I. PETITION FOR WRIT OF CERTIORARI — PAGE

Opinions Below 2
Jurisdiction 2
Statutes and Regulations Involved 2
Questions Presented 3
Statement 3
Reasons for Granting the Writ 7

CITATIONS.

Cases:

Blakeslee et al. v. Smith, 110 F. (2d) 364, (C.C.A. 2) 7
Colorado National Bank of Denver v. Commissioner, 305 U. S. 23 7
Commissioner v. Branch, 114 F. (2d) 985, (C.C.A. 1) 9
Commissioner v. Waterbury, 97 F. (2d) 838 ... 10
Denniston v. Commissioner, 106 F. (2d) 295 (C.C.A. 3) 8
Dort v. Helvering, 69 F. (2d) 836, Certiorari denied 293 U. S. 569 9
Reinecke v. Northern Trust Company, 278 U. S. 339 9
United States v. Wells, 283 U. S. 102 7

Statutes:

Revenue Act of 1926 as amended, 44 Stat. 9, Sec. 302 21
Revenue Act of 1932, Sec. 803 (a), 47 Stat. 169 21
Revenue Act of 1936, 49 Stat. 1648, Section 805, (a) (b) 22

PAGE

II. BRIEF IN SUPPORT OF PETITION

Opinions Below 11
Jurisdiction 11
Statement of the Case 12
Specification of Errors 12
Argument 13
Conclusion 20

CITATIONS.

Cases:

Blakeslee et al. v. Smith, 110 F. (2d) 364, (C.C.A. 2) 12
Colorado National Bank of Denver v. Commissioner, 305 U. S. 23 ..... 13, 15
Del Vecchio v. Bowers, 296 U. S. 280 18
Denniston v. Commissioner, 106 F. (2d) 295 (C.C.A. 3) 15, 17
Dort v. Helvering, 69 F. (2d) 836, Certiorari denied 293 U. S. 569 18
Gould v. Gould, 245 U. S. 151 19
Heiner v. Donnan, 285 U. S. 312 18
N. Y. Life Insurance Company v. Gamer, 303 U. S. 161 18
Old Colony R. Company v. Commissioner, 284 U. S. 552 19
Porter v. Commissioner, 288 U. S. 436 18
Reinecke v. Northern Trust Company, 278 U. S. 339 18
Renton Investment Company v. Commissioner, 131 F. (2d) 330 (C.C.A. 3) 19
United States v. Wells, 283 U. S. 102 14

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WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Commonwealth Trust Company of Pittsburgh and J. Knowles Woodwell, Executors of the Estate of John W. Herron, deceased, respectfully petition your Honorable Court that a Writ of Certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Third Circuit, entered July 9, 1943, affirming the judgment of the District Court of the

United States for the Western District of Pennsylvania, entered February 27, 1943, in favor of the Defendant-Respondent, and against the Plaintiff-Petitioners.

Opinions Below.

The opinion of the United States District Court is printed at pages 86 a to 92 a of the record, and is reported in 50 Fed. Supp. 949. The opinion of the Circuit Court of Appeals is printed in the record, (R. 102 a) It is a Per Curiam opinion and is reported in 137 Fed. (2d) 653 and reads as follows:

> "The judgment of the District Court is affirmed for the reasons sufficiently and satisfactorily given in the opinion of Judge Schoonmaker."

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 9, 1943. A petition for rehearing was filed July 24, 1943. Rehearing was denied September 20, 1943, and an order was entered on the same date.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

Statutes and Regulations Involved.

The statutes and regulations involved may be found in the appendix, *infra,* pp. 21-22.

Questions Presented.

1. Where a voluntary transfer of property is made by a decedent to his wife, can such transfer be conclusively presumed to have been made in contemplation of death solely upon the finding that in making such transfer it was decedent's intention to avoid estate tax, notwithstanding the fact the record shows the transfer was only 6.43% of decedent's estate, shows decedent was in good health and spirits and was active in business at the time the transfer was made, and contains various other facts evidencing that thoughts of life controlled his actions at that time?

2. Does a power to substitute securities at any time, reserved by the settlor of an irrevocable trust, created for the purpose of providing a competence for his two daughters, constitute such transfer one in which the enjoyment thereof was subject at the time of settlor's death, to a change through the exercise of a power to alter, amend or revoke, within the purview of Section 302(d) of the Revenue Act of 1926, as amended by Section 805 of the Revenue Act of 1936?

Statement.

Transfers of June 20, 1932.

On June 20, 1932, decedent caused to be transferred from himself and his wife, as tenants by the entireties, to his wife alone, the record title to two parcels of real estate, being respectively, the homestead property at Fifth Avenue and Clyde Street, Pittsburgh, Pennsylvania, and the family garage property on Winthrop Street, Pittsburgh, Pennsylvania. (R. 95 a).

Decedent had originally acquired the homestead

property in 1923 in part by purchase from the estate of his mother in 1906, in part by purchase from his sister in 1923, and in part by devise from his mother. (R. 95 a). He had caused the title to be transferred to himself and his wife, as tenants by the entireties, on April 14, 1924. (R. 95 a)

Decedent had originally acquired the garage property by purchase in 1901, (R. 95 a), and he caused the title to be transferred from himself to himself and his wife, as tenants by the entireties, June 17, 1932. (R. 95 a)

Decedent was eighty and one-half years old on June 20, 1932, at the time of the transfers in question. He had been President of the Commonwealth Trust Company of Pittsburgh from 1902 to 1923, when he became Chairman of its Board, which office he retained until his death on February 13, 1937. (R. 95 a, 96 a).

Until his last illness decedent maintained an office in the bank and was there almost daily. (R. 96 a). He was in constant contact with the officers of the bank, attended numerous committee and board meetings, never spoke or complained of illness and was mentally and physically active. He never spoke to the men with whom he was most closely associated, of death or fear of death or life after death. (R. 96 a). He was an active Trustee of the Mary E. Schenley Estate, and a director in various other companies. (R. 23 a).

The value of decedent's gross estate, as determined by the Commissioner, was $680,000.97. The value of the above described properties, transferred on June 20, 1932, represented only 6.43% of said gross estate, and 7.66% of the net estate for distribution. (R. 53 a-57 a).

Suit was filed by the taxpayer in the District Court of the United States for the Western District of Penn-

sylvania, to recover an alleged overpayment of Federal Estate tax and interest by reason of the Commissioner of Internal Revenue's erroneous inclusion in the gross estate of the decedent of the above mentioned properties at a valuation of $43,772.00, as a transfer made in contemplation of death. The District Court held that the transfers had been made in contemplation of death. (R. 90 a) In its opinion the District Court, after reviewing the facts held (R. 89 a), that the facts failed to prove that these particular properties were not transferred in contemplation of death. The opinion then states as follows:

> "On these facts we can draw no other conclusion than that the transfer was made with intention that these properties should not be liable for Federal Estate tax. If that is so, naturally the transfer must have been made in contemplation of death. This must have been the controlling motive that brought about the transfer of these properties to his wife alone."

TRANSFER OF NOVEMBER 18, 1922.

In the said suit filed by the taxpayer, the Government, by way of set-off, asserted that the value of a trust fund created by decedent on November 18, 1922, should have been included in decedent's gross estate, pursuant to Sec. 302 (d) of the Revenue Act of 1926 as amended.

The decedent for the purpose of providing a competence to his two daughters, transferred certain securities to a Trustee to collect the income therefrom and distribute it to them during their natural lives. The trust instrument contained the following provisions: (R. 97 a)

"The Settlor * * * does * * * herewith * * * deposit with the Trustee, the securities which are set forth in detail in a schedule attached hereto, made a part hereof and marked Exhibit "A", which said securities or substitutions therefor by the Settlor (the Settlor having the right to make any substitutions of securities from time to time as he deems advisable) * * *. The Settlor agrees that the Trustee shall not be held accountable or liable for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor, being held liable solely for such lawful trust investments as it may make and the proper application of the income therefrom."

Decedent reserved to himself no right or power whatsoever, other than the right of substitution. (R. 77 a-85 a, 97 a, 98 a). The securities deposited upon creation of the trust, as shown by Exhibit "A" attached to the trust instrument, (R. 81 a-85 a), consisted of $79,000.00 par value of bonds, $7,000.00 par value of stocks, and 150 shares of common stock without par value. Substitutions were made by decedent from time to time. The value of the securities substituted varied slightly, some having a value greater, some equal to, and some less than the value of the securities taken out. The substitutions as a whole resulted in a net gain of the sum of $2,010.00. (R. 34 a). The value of the trust at the date of decedent's death was the sum of $114,071.11. (R. 94 a)

The United States District Court held that the settlor had retained the right to make any substitutions he might desire, without restriction as to the kind or value of the securities substituted, and consequently

decedent had reserved the power to alter, amend or revoke the trust in that he had the right to change the value of the trust *res,* (R. 92 a), and to effectively terminate the trust. The value of said trust estate held to be includible in decedent's gross estate. (R. 98 a)

The judgment entered in favor of the defendant in the District Court (R. 99 a), was affirmed by the Circuit Court of Appeals on July 9, 1943. Plaintiff's petition for rehearing was denied September 20, 1943. (R. 100 a)

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals in affirming the judgment of the District Court for the Western District of Pennsylvania, that the transfers in 1932 were made in contemplation of death, conflicts in principle with the decisions of other Circuit Courts of Appeal, and applicable decisions of this Court, which have announced and adhered to the principle that the mere fact a settlor establishes a trust with the intention of making provision for his wife or children after his death, is not enough conclusively to establish such trust as made "in contemplation of death"; that something more than a mere showing that the settlor acted with regard to his ultimate death is required in order to show that a conveyance comes within the ambit of the statute. See *U.S. v. Wells,* 283 U.S. 102; *Colorado National Bank of Denver v. Commissioner,* 305 U.S. 23; *Blakeslee et al. v. Smith,* 110 F. (2d) 364, (C.C.A. 2).

The decision of the United States District Court, as affirmed by the Circuit Court of Appeals, makes a finding that the transfer in question was made "with intention that these properties should not be liable for

Federal Estate tax." (R. 89 a, 90 a) The opinion then makes the following comment: (R. 90 a)

> "If that is so, naturally the transfer must have been made in contemplation of death. This must have been the controlling motive that brought about the transfer of these properties to his wife alone."

It seems to be clear that the court's conclusion that the transfer was made in contemplation of death is considered as a compulsory one, solely because there was in the record evidence to justify the court's finding that *one* of the things motivating the transfer was decedent's desire to avoid Federal estate tax. It is the apparent position of the court that all the evidence in the record to the effect that the transfer constituted but a small part of decedent's estate, and that at the time decedent was in good health, cheerful and active in business, should be given no weight; that when it once appears that decedent made the transfer with the intention of avoiding Federal estate tax, and conserving the estate passing at his death, such motive must thereupon be accepted as the only motive.

It is important in the administration of the Revenue Acts, both to the Treasury Department and to taxpaying citizens, that this apparent conflict be clarified.

2. The decision of the Circuit Court of Appeals in affirming the judgment of the District Court for the Western District of Pennsylvania, appears to be in direct conflict with its own decision in the case of *Denniston v. Commissioner,* 106 F. (2d) 295, (C.C.A. 3) in which it was held that the desire or intention to avoid Estate taxes, *standing alone,* should not be deemed conclusive

of a mental state such as is contemplated by the statutory phrase "contemplation of death." The opinion of the United States District Court, as affirmed per curiam, makes no effort to distinguish the facts in the instant case from those in the *Denniston* case, or to point out why the principles set out in the *Denniston* case should not be applicable. A possible implication of the instant decision is that there is an affirmative duty on the petitioners to not only show facts evidencing the settlor's state of mind, sufficient to meet the prima facie correctness of the Commissioner's finding, but also to show affirmatively that a *particular* life purpose was in fact the *impelling motive* for the creation of the trust. The burden of proof placed upon the taxpayer does not go that far.

3. The decision of the United States District Court, as affirmed by the Circuit Court of Appeals, that decedent's irrevocable transfer in trust on November 18, 1922, was a transfer of property, the enjoyment of which at the time of his death, was subject to change through the exercise of a power by decedent to "alter, amend or revoke" in that decedent had reserved to himself the *power of substitution,* conflicts in principle with the decisions of other Circuit Courts of Appeals and applicable decisions of this court. The principle has been announced in various cases that a power reserved by the settlor of an irrevocable trust which affects the *"mere mechanics"* of the trust, is not the equivalent of a power to "alter, amend or revoke." *Dort v. Helvering,* 69 F. (2d) 836, Certiorari denied, 293 U. S. 569; *Commissioner v. Branch,* 114 F. (2d) 985 (C.C.A. 1).

The change contemplated by Section 302(d) of the Revenue Act of 1926, as amended, must affect the

economic benefits to be received by the beneficiaries, it must be a change in the trust instrument which affects the beneficiaries' rights of enjoyment of the trust *res*, the *quality* and *not the quantum of enjoyment*. *Reinecke v. Northern Trust Company*, 278 U. S. 339; *Commissioner v. Waterbury*, 97 F. (2d) 838, Certiorari denied 305 U. S. 638.

No other case has been found in which the power reserved to a settlor was the power of "substitution." The issue here raised is to that extent a new one, and your petitioners submit that the term "substitution" when it relates to trust property necessarily requires the substitution of property *of like kind and reasonably equivalent value*. Petitioners believe that the use of this term in numerous existing trusts and the general acceptance of its meaning as above defined, makes the matter one of interest and importance in the administration of the Revenue Acts, and both the Treasury Department and numerous taxpayers are entitled to clarification.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition should be granted.

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